APPENDIX.

CONSTITUTION OF THE UNITED STATES.

ARTICLE XIV.

Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REVISED STATUTES OF OHIO.

§ 3812. Special assessments, how made.—Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost and expense connected with the improvement of any street, alley, dock, wharf, pier, public road, or place by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves, docks, retaining walls, sewers, drains, watercourses, water mains or laying of water pipe and any part of the cost of lighting, sprinkling, sweeping, cleaning or planting shade trees thereupon, and any part of the cost and expense connected with or made for changing the channel of, or narrowing, widening, dredging, deepening or improving any stream, or water-

course, and for constructing or improving any levee or levees, or boulevards thereon, or along or about the same, together with any retaining wall, or riprap protection, bulkhead, culverts, approaches, flood gates, or water ways, or drains incidental thereto, or making any other improvement of any river front or lake front (whether such river front or lake front be privately or publicly owned), which the council may declare conducive to the public health, convenience or welfare, by any of the following methods:

First: By a percentage of the tax value of the property assessed.

Second: In proportion to the benefits which may result from the improvement, or

Third: By the foot front of the property bounding and abutting upon the improvement. (107 v. 629; 101 v. 134; 96 v. 26, §9; 97 v. 98, §50.)

§ 3814. Resolution of necessity.—When it is deemed necessary by municipality to make a public improvement to be paid for in whole or in part by special assessments, council shall declare the necessity thereof by resolution, three-fourths of the members elected thereto concurring, except as otherwise herein provided. Such resolution shall be published as other resolutions, but shall take effect upon its first publication. (97 v. 121, §51.)

§ 3815. Determination of nature of improvement; method of assessment and payment.—Such resolution shall determine the general nature of the improvement, what shall be the grade of the street, alley, or other public place to be improved, the grade or elevation of the curbs, and shall approve the plans, specifications, estimates and profiles for the proposed improvement. In such resolution council shall also determine the method of the assessment, the mode of payment, and whether or

not bonds shall be issued in anticipation of the collection thereof. Assessments for any improvement may be payable in one to twenty installments at such time as council prescribes. (107 v. 151; 97 v. 121, §51.)

§ 3816. Plans, specifications, estimates and profiles to be prepared and filed.—At the time of the passage of such resolution, council shall have on file in the office of the director of public service in cities, and the clerk in villages, plans, specifications, estimates and profiles of the proposed improvement, showing the proposed grade of the street and improvement after completion, with reference to the property abutting thereon, which plans, specifications, estimates and profiles shall be open to the inspection of all persons interested. (97 v. 121, §51.)

§ 3817. Bonds and interest thereon.—When bonds are issued in anticipation of the collection of the assessment, the interest thereon shall be treated as part of the cost of the improvement for which assessment may be made. If such assessment or any installment thereof is not paid when due, it shall bear interest until the payment thereof at the same rate as the bonds issued in anticipation of the collection thereof, and the county auditor shall annually place upon the tax duplicate the penalty and interest as therein provided. (97 v. 121, §51.)

§ 3818. Notice, how served.—A notice of the passage of such resolution shall be served by the clerk of council, or an assistant, upon the owner of each piece of property to be assessed, in the manner provided by law for the service of summons in civil actions. If any such owners or persons are not residents of the county, or if it appears by the return in any case of the notice, that such owner cannot be found, the notice shall be published at least twice in a newspaper of general circulation with-

in the corporation. Whether by service or publication, such notice shall be completed at least twenty days before the improvement is made or the assessment levied, and the return of the officer or person serving the notice, or a certified copy of the return shall be *prima facie* evidence of the service of the notice as herein required. (97 v. 122, §52.)

§ 3819. Limitation of assessments.—The council shall limit all assessments to the special benefits conferred upon the property assessed, and in no case shall there be levied upon any lot or parcel or land in the corporation any assessment or assessments for any or all purposes, within a period of five years, to exceed thirty-three and one-third per cent. of the actual value thereof after improvement is made. Assessments levied for the construction of main sewers shall not exceed the sum that in the opinion of council would be required to construct an ordinary street sewer or drain of sufficient capacity to drain or sewer the lots or lands to be assessed for such improvement, nor shall any lots or lands be assessed that do not need local drainage or which are provided therewith. (97 v. 126, §53.)

§ 3820. Municipality to pay portion of cost of improvement.—The corporation shall pay such part of the cost and expense of improvements for which special assessments are levied as council deems just, which part shall be not less than one fiftieth of all such cost and expense, and in addition thereto, the corporation shall pay the cost of intersections. (97 v. 126, §53.)

§ 3825. Ordinance for improvement, what to contain.—If the council decides to proceed with the improvement, an ordinance for the purpose shall be passed. Such ordinance shall set forth specifically the lots and lands

to be assessed for the improvement, shall contain a statement of the general nature of the improvement, the character of the materials which may be bid upon therefor, the mode of payment therefor, a reference to the resolution therefore passed for such improvement with date of its passage, and a statement of the intention of council to proceed therewith in accordance with such resolution and in accordance with the plans, specifications, estimates and profiles provided for such improvement. (97 v. 122, §55.)

§3834. When certain special assessments deemed valid and binding.—When special assessments are made upon property for the construction of an improvement, and several kinds of material have been named in the ordinance, or ordinances, providing therefor, and on which bids have been received for the construction of such improvements with any and all of such materials, such assessments shall be valid and binding assessments upon the property so assessed. In the construction of sewers, excepting main or district sewers, notice of the passage of the resolution therefor shall be made in the manner hereinbefore provided. (87 v. 123, §60.)

§3835. Council not to proceed with improvement without concurrence of three-fourths; exception.—No public improvement, the cost or part of cost of which is to be specially assessed on the owners of property, shall be made without the concurrence of three-fourths of the members elected to council, unless the owners of a majority of the foot frontage to be assessed, petition in writing therefor, in which event the council, a majority of the members elected thereto concurring, may proceed with the improvement in the manner herein provided. (96 v. 42, §61.)

IN THE

Supreme Court of the United States

No. 29,425.

Term No. 231.

October Term, 1923.

WESLEY HETRICK,

Plaintiff in Error.

vs.

THE VILLAGE OF LINDSEY, OHIO, ET. AL.,

Defendants in Error.

Error to the Supreme Court of the State of Ohio.

BRIEF ON BEHALF OF DEFENDANT IN ERROR, THE VILLAGE OF LINDSEY, OHIO.

W. J. MEAD, *Fremont, Ohio,*
Attorney for Defendant in Error.

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THE VILLAGE OF LINDSEY, OHIO, ET. AL.,

Defendants in Error.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error was the plaintiff in the action brought in the Court of Common Pleas of Sandusky County, Ohio, on June 8th, 1921, to enjoin the collection of the special assessments assessed by the Council of the Village of Lindsey, Ohio, against the property of

plaintiff, to-wit, $199.65 against Lot No. 175, and $840.95 against Lot. No. 176 in said village, for the improvement of Railroad Street in said village, plaintiff claiming different irregularities and also defects in the law under which said improvement and assessments were made. (Record pages 6-7 for petition).

To this petition said village answered denying all irregularities and defects, and setting forth plaintiff's knowledge of and participation in the work of said improvement. (Record pages 8-9).

In the hearing of said case in said court the only grounds claimed by plaintiff against the validity of said assessment were,

1. That said assessment exceeded the benefits to said lots or either of them,

2. That said assessment was in excess of the limit allowed by law to be levied upon property for local improvement, and

3. That the provisions of the General Code of Ohio are unconstitutional and void for the reason that they do not provide for notice to be given to the owner of property to be assessed and an opportunity to be heard before the tax is levied, and are therefore repugnant to and in conflict with Article 1, Section 16, and Article 1, Section 19 of the Constitution of the State of Ohio, and for the same reason in conflict with and repugnant to Section 1 of the Fourteenth Amendment to the Consttiution of the United States, in that they permit the taking of property without due process of law

In the hearing of said case a large amount of evidence was heard by said Common Pleas Court especially on the questions of benefits and values, and on Jan. 26th, 1922, said court sustained said assessment in its entirety and dismissed plaintiffs petition. (Record page 10).

Plaintiff then appealed the case to the Court of Appeals of said county, and the case was fully heard by that court, a large amount of evidence being presented at this hearing, which court on May 9th, 1922, found the value of said lots after the completion of the improvement to be $2,600.00 and that they were especially benefited to the extent of one-third of this value, and reduced said assessment from $1,040.60 on both lots to $866.67, and decreed that the amount of $866.67 was legally assessed against said property, and held against the claim of plaintiff that the provisions of the General Code of Ohio relating to special assessments for street improvements are unconstitutional. (Record pages 2-3).

Plaintiff's motion for a new trial was overruled, (Record page 3), and on plaintiff's request a finding of facts was made by said court (Record pages 3-4-5), and filed July 10th, 1922.

Said improvement is a brick pavement upon a concrete foundation and is 1,082 feet in length.

At and before the commencement of the proceedings to improve said street said lots were platted lots. (Fact 11).

Said lots adjoin, each abuts said improvement, and a saw mill property is located upon both said lots and a saw mill business transacted thereon. (Fact 12).

The assessment was made by the foot front of the property bounding and abutting upon the improvement, and assessments were made of $199.65 against Lot 175 and $840.95 against Lot 176.

Notice of the passage of the resolution of necessity for the improvement was served by the clerk in writing on the plaintiff personally on May 10th, 1920, which, with reference to the other proceedings, was at a proper time. (Fact 4).

Plaintiff was, in fact, served with a complete copy of the resolution.

Plaintiff in error had full knowledge of the work as it progressed and made no objections thereto. (Fact 18).

Plaintiff with his counsel appeared before and consulted with the Council as to the manner of the construction of the improvement and thereby caused it to be constructed in front of his property in the manner desired by him. (Fact 20).

The Council acted in good faith. (Fact 24).

The Council found the several lots to be especially benefited to the extent of the levy made against them. (Fact 15).

Plaintiff filed no claim for damages. (Fact 16).

Plaintiff never requested a hearing before the Council in said matter. (Fact 17).

All meetings of the Council were open and held at the usual meeting place. (Fact 23).

Said improvement was completed about December 1st, 1920. (Fact 19).

"All resolutions and ordinances required by the statute were passed by the Council and publications and service of the same was made and all notices were given and all things required by the statutes to be done were properly done by the Council and officers of said village and all proceedings relative to said improvements were regular and in accordance with the statutes, if the mailing of the notice of the assessment to plaintiff was in accordance with the statutes, and this court finds that such mailing was in accordance with the statute." (Fact 13).

Other findings of fact, 24 in all, were made by the court.

To said judgment of said Court of Appeals said plaintiff prosecuted error and filed his petition in error

in the Supreme Court of Ohio, as of right, on the 17th day of July, 1922. (Record page 18).

Petition in error in the Supreme Court of Ohio appears (Record page 1).

On October 23rd, 1922, defendants in error filed in the Supreme Court of Ohio, their motion to dismiss said petition in error, on the ground that same was filed in said court without leave first granted, plaintiff in error claiming that the case involves a question under the Constitution of the United States, in that the statutes of the State of Ohio relating to special assessments for street improvements are unconstitutional in that they are contrary to the Fourteenth Amendment to the Constitution of the United States, when in fact these statutes have so long been held constitutional by the courts of the state and have so long been accepted and followed by the practice of the state as constitutional, that their constitutionality can no longer be questioned, and said petition in error should not be filed as a matter of right and is on file without authority or right. (Record pages 10-11).

A hearing was had on said motion and on December 5, 1922, said court sustained said motion and dismissed said petition in error. (Record page 11).

On February 7th, 1923, plaintiff in error filed his petition for a writ of error (Record pages 12-13), and on said date same was allowed by Hon. C. T. Marshall, chief justice of the Supreme Court of the State of Ohio. (Record pages 13-15).

The questions that said assessment exceeded the benefits to said property and that it exceeded one-third of the value of the property after the improvement was completed were both raised in the Common Pleas Court and the Court of Appeals and determined as hereinbe-

fore stated, but neither of them were raised in the Supreme Court and probably could not be.

State, ex. rel., vs. Sockman, 84 O. S. 477;
State, ex. rel., vs. The Union Central Life Insurance Co., 84 O. S. 459;
Meyer vs. Beck, et. al., 87 O. S. 182, 186.

There was but one point of contention before the Supreme Court of Ohio, to-wit, that the statutes of Ohio relating to special assessments for street improvements are contrary to the Fourteenth Amendment to the Constitution of the United States, in that they fail to provide for notice to and hearing of the owner of the property assessed, and thereby permit such owner to be deprived of his property without due process of law, and this was the only question plaintiff in error attempted to bring before said court, and he was there heard both on brief and in oral argument, *and this is the only question before or that can now be before this court in this case.*

ARGUMENT.

In the ten assignments of error (Record pages 14-15), there is but one claim, the unconstitutionality of the special assessment statutes of Ohio, and this claim is made solely for the reason that said statutes do not provide for a proper notice, and do not provide for a hearing or opportunity to be heard with reference to a special assessment before it becomes a finality as required by the due process of law clause of the Fourteenth Amendment to the Constitution of the United States. (Sixth assignment, Record page 15). The other assignments are but repetitions of this.

Notice.

Notice to the owner of property to be assessed is provided for in the statutes.

> "When it is deemed necessary by a municipality to make a public improvement to be paid for in whole or in part by special assessments, Council shall declare the necessity thereof by resolution * * * Such resolution shall be published as other resolutions, but shall take effect upon its first publication." Section 3814, General Code of Ohio.

Section 3815 G. C. O. provides what shall be determined in said resolution.

> "*A notice of the passage of such resolution shall be served by the clerk of Council, or an assistant, upon the owner of each piece of property to be assessed, in the manner provided by law for the service of summons in civil actions.* If any such owners or persons are not residents of the county or if it appears by the return in any case of the notice that such owner cannot be found, the notice shall be published at least twice in a newspaper of general circulation within the corporation. Whether by service or publication such notice shall be completed at least twenty days before the improvement is made or the assessment levied, and the return of the officer of person serving the notice, or a certified copy of the return shall be *prima facie* evidence of the service of the notice as herein required." Section 3818 G. C. O.
>
> "At the expiration of the time limited for so filing claims for damages, the Council shall determine whether it will proceed with the proposed improvement" * * * Section 3824 G. C. O.
>
> "If the Council decides to proceed with the improvement, *an ordinance for the purpose shall be passed. Such ordinance shall set forth specifically the lots and lands to be assessed for the improvement,* shall contain a statement of the general nature of the improvement, the character of the materials which may be bid upon therefor, the

mode of payment therefor, a reference to the resolution therefore passed for such improvement with date of its passage, and a statement of the intention of Council to proceed therewith in accordance with such resolution, and in accordance with the plans, specifications, estimates and profiles provided for such improvement." Section 3825 G. C. O.

" * * * Ordinances of a general nature, *or providing for improvements shall be published* as hereinafter provided before going into operation * * * " Section 4227 G. C. O.

Section 3881 G. C. O. provides for assessment and issue of bonds, and the latter part of said section is as follows:

"Any person so assessed shall have the option of paying his proportion of the assessment in cash within the period of thirty days from the date of levy thereof *upon due notice being given.*"

Thus in addition to the requirement of publication of the resolution and ordinances, service of notice by Section 3818, and notice by Section 3881 is required, and this latter section does not provide the kind or manner of notice, so

"Where a statute requires notice of a proceeding, but is silent concerning its form or manner of service, actual notice will alone satisfy such requirement." *Moore vs. Given,* 39 O. S. 661, Syl. 2.

The notice required by Section 3818 was served strictly in conformity with the statute, and when so done this notice has been held by the Supreme Court of Ohio to be sufficient to give the Council jurisdiction and authority to assess.

City of Canton vs. Wagner, 54 O. S. 329;
Joyce vs. Barron, Treas., 67 O. S. 264;
Cincinnati vs. Sherike, 47 O. S. 217.

Also the property owner is charged with notice of the proceedings after notice of the passage of the resolution of necessity, and with notice of the publications.

The Ohio Supreme Court has held the notice of Section 3818 sufficient to give the property owner the right to approach the Council and be heard with respect to the character of the pavement to be laid, as well as to file his claim for damages.

Joyce vs. Barron, Treas., 67 O. S. 264, 269;
Also, Green vs. Cincinnati, 4 O. C. D. 573, 574.

It has been held that where a statute does not provide for notice to owners of property to be assessed, such failure does not render the statute unconstitutional or void, also

That notice by publication is sufficient for assessment of tax for construction of a sewer.

Paulsen vs. Portland, 149 U. S. 29, Book 37, page 640;
Security Trust Co., etc., vs. City of Lexington, 203 U. S. 324, 51 L. Ed. 204.

"The Legislature of a state may provide for the apportionment of the cost of a street pavement upon the abutting lots, according to frontage, without any preliminary hearing as to benefits, and this will not constitute a taking without due process of law."

French vs. Barber Asphalt Paving Co., 181 U. S. 324, 45 L. Ed. 879.

Owner's Right to Hearing.

Council meetings are open to the public. Section 4239 G. C. O.

The notice provided for in Section 3818 gives the right to approach the Council.

Joyce vs. Barron, Treas., 67 O. S. 264, 269;
Green vs. Cincinnati, 4 O. C. D., 573, 574.

Plaintiff with his counsel was heard by the Council as to the manner of improvement. (Fact 20).

Sections 3827, 3828, 3830, 3831 and 3832 provide for the consideration and determination of the owner's damages, if any.

> "Before adopting an assessment made as provided in this chapter, the Council shall publish notice for three weeks consecutively, in a newspaper of general circulation in the corporation, that such assessment has been made, and that it is on file in the office of the clerk for the inspection and examination of persons interested therein." Section 3895 G. C. O.
>
> "If any person objects to an assessment, he shall file his objections, in writing, with the clerk, within two weeks after the expiration of such notice, and thereupon the Council shall appoint three disinterested freeholders of the corporation to act as an equalizing board." Section 3848 G. C. O.

Section 3850 provides for a hearing by the Board of Equalization of all objections made to assessments and authorizes that board to make such finding and order as shall be required by the facts.

> "Common pleas and superior courts may enjoin the illegal levy or collection of taxes and assessments, and entertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected." Section 12075 G. C. O.

Plaintiff under this section has had two full hearings upon the merits of the assessments, one in the Common Pleas Court and one in the Court of Appeals, and

this in addition to the consideration and determination by the village Council with his right to there appear, had he so desired, and the assessments did not become a finality until the determination by the Court of Appeals which court is authorized under the laws of Ohio to, in such cases, determine the amount properly assessable.

> * * * "The court * * * may render judgment for the amount properly chargeable against said defendant or on such lot or land, but in such cases the court shall make such order for the payment of costs as it may deem equitable or proper." Section 3901 G. C. O.
>
> In a suit brought by a treasurer to collect a street assessment, and a judicial determination is made that the assessment substantially exceeds the benefits, the trial court has jurisdiction, upon proper pleadings, to go forward and determine what amount should be assessed.
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> Walsh, et. al., vs. Sims, Treas., et al., 65 O. S. 211;
>
> Griswold vs. Pelton, Treas., 34 O. S. 482.

Whenever by the laws of a state or any state authority a tax is imposed upon property for the public use, and provides for a mode of contesting the charge thus imposed in the ordinary courts of justice, the owner of such property has due process of law.

> Walston vs. Nevin, et al., 128 U. S. 578, Book 32, page 544;
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> McMillin vs. Anderson, 95 U. S. 37, Book 24, page 335;
>
> Davidson vs. Board of Administrators, etc., 96 U. S. 97, Book 24, page 616;
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> Paulson vs. City of Portland, 149 U. S. 37, Book 37, page 637;
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> Spencer vs. Merchant, 125 U. S. 345, Book 31, page 768;
>
> King vs. Mullins, 171 U. S. 405, Book 43, page 214;

King vs. Portland, 184 U. S. 61, 69-70, 46 L. Ed. 431, 436;
Adler vs. Whitbeck, 44 O. S. 539, 571;
Musser vs. Adair, 55 O. S. 466, 474;
Hodge vs. Muscatine County, et. al., 196 U. S. 275, 281-282, 49 L. Ed. 477, 481-482;
Security Trust, Etc., Co., vs. City of Lexington, 203 U. S. 323, 51 L. Ed. 204, 208;
Ballard vs. Hunter, 204 U. S. 242, 255, 51 L. Ed. 462, 472.

Limitations Provided.

Section 6 of Article 13 of the Constitution of Ohio provides that the General Aseembly shall restrict municipal corporations in assessments, etc., so as to prevent the abuse of such power.

Section 3820 G. C. O. requires the corporation to pay such part of the expense of improvements for which special assessments are levied as to the Council seems just, but this part shall not be less than 1/50 of all such cost and expense and in addition the cost of intersections.

> "The Council shall limit all assessments to the special benefits conferred upon the property assessed, and in no case shall there be levied upon any lot or parcel of land in the corporation any assessment or assessments for any or all purposes, within a period of five years, to exceed thirty-three and one-third per cent. of the actual value thereof after the improvement is made. * * * " Section 3819 G. C. O.
>
> " * * * but the proceedings shall be strictly construed in favor of the owner of the property assessed or injured, as to the limitations on assessment of private property, and compensation for damages sustained." Section 3911 G. C. O.

This section refers to improvements of any kind.

Not a Taking of Property.

Plaintiff has and probably will here contend that this was a taking of his property. This cannot be until the assessment exceeds the benefits. There were no damages to his property. The determination of the Court of Appeals of the benefits is final.

There is no complaint that this assessment is not uniform or ratable.

A ratable assessment of the property to the extent of the special benefits, violates no constitutional right of the owner, and is just and proper.

Walsh vs. Barron, Treas., 61 O. S., 15.

The special assessment statutes of Ohio, as often as the question has been raised, have been held not to violate the Constitution of Ohio.

Hill vs. Higdon, 5 O. S. 243;
Ernst vs. Kunkle, 5 O. S. 520;
Reeves vs. Treasurer, 8 O. S. 333;
Walsh vs. Barron, Treas., 61 O. S. 15;
City of Dayton vs. Bauman, 66 O. S. 379, 393;
County Commissioners vs. Gates, 83 O. S. 31-32;
Railroad Company vs. Connelly, 10 O. S. 160;
Conservancy District vs. Ryan, 104 O. S. 85,

and also that they do not violate the Constitution of the United States.

Ernst vs. Kunkle, 5 O. S. 524;
Schroeder vs. Overman, Clerk, etc., 61 O. S. 1.

> "All courts shall be open and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law."
>
> Article 1, Section 16, Ohio Constitution.

The General Code of Ohio, Section 3812, specifies the purposes, the property upon which and the method by which special assessments may be levied by municipal corporations. It operates alike upon all persons and property similarly situated, and provides for notice to the owners of the property to be assessed and opportunity for hearing before the municipal authorities, and also for a proceeding in and full hearing by the courts of the state, which courts are empowered to correct or set aside any wrongful or excessive assessment, or part thereof. Plaintiff has had the advantage of all these safeguards, and availed himself of the privilege. If this be not due process of law, how can due process of law be prescribed?

That this assessment was made strictly in accordance with the laws and Constitution of Ohio is not disputed. The Ohio courts have so found. That such assessments do not violate the Constitution of the United States has been for many years held as settled law by the Supreme Court of the United States. To cite the cases determined by the supreme courts of the different states and of the Supreme Court of the United States in which such assessments have been maintained would require many pages.

It seems that a brief examination of these authorities would convince plaintiff in error that his claim here is untenable, and while any constitutional question with

proper grounds for presentation would not be frivolous, yet it is frivolous to present an untenable claim against long settled principles.

It also seems that this question would not need further argument and ought to be affirmed, and also that this court might well dismiss the petition in error as an unwarranted appeal to the court.

Respectfully submitted,

W. J. MEAD,
Attorney for the Village of Lindsey, Ohio.